

1703152 (Migration) [2018] AATA 4385 (27 August 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1703152

MEMBER: Karen McNamara

DATE: 27 August 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 27 August 2018 at 3:40pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) – Subclass 801 (Spouse) – insufficient evidence of relationship – live separately – separate finances – living arrangements not indicative of a married relationship – adverse information concerning Centrelink payments – marital status not declared to government agencies – lack of knowledge of each other’s lives – relationship breakdown – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 375A, 376
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cl 801.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 February 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 23 April 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 4 July 2018 to give evidence and present arguments.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

6. Background

7. The applicant was born in Jordan in [year]. His mother, two brothers and a sister live in Jordan and one sister lives in [another country]. On 28 June 2007, he entered Australia as the holder of a [temporary] visa which was valid until 5 September 2013. On 23 April 2013, he lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa. On 30 May 2014 he was granted a subclass 820 visa.
8. The sponsor was born in Australia on [date]. She has [several] adult children to a previous relationship.
9. The Tribunal was told that the applicant met his sponsor, [a named person], on 14 January 2012 at the food court in [Suburb 1] Shopping Centre, [Suburb 1] NSW. They committed to a shared life together on 14 February 2013 and married on 4 April 2013.
10. The applicant told the Tribunal that the relationship deteriorated following the Department of Immigration and Border Protection (the Department) advising the applicant of adverse information concerning the sponsor claiming Centrelink payments.
11. In August and September 2016, the Department received information that the parties relationship was contrived and that the applicant paid the sponsor to marry him in order to obtain Australian citizenship. The Department received further information that the sponsor was in receipt of Centrelink payments. The Department provided opportunity to the applicant to respond to this information which according to the applicant was the catalyst for the break down in the relationship. The parties are no longer in a relationship and the applicant has supplied Statutory Declarations to the Tribunal claiming he was subject to family violence perpetrated by the sponsor. The applicant's claims of family violence were provided to the Tribunal on 9 March 2018.

12. The applicant has provided to the Tribunal a copy of the delegate's decision of 9 February 2017.

13. **The Tribunal Hearing**

14. The applicant was told that a non-disclosure certificate has been issued pursuant to s.375A of the *Migration Act 1958 (the Act)* in relation to certain material which is on the Department's case file.

15. The Department has sought to restrict the disclosure of folios 28–30 and 37–40. The reason stated for non-disclosure is that the information contains a request to Centrelink for information. This request contains legislation not relevant to this application. It also identifies officers from another Agency whose role within the organisation relates to Intelligence analysis.

16. The Tribunal considers that the s.375A certificate is valid. The applicant was invited to comment on the validity of the certificate. The applicant provided no comment.

17. The Tribunal is satisfied that the information that is subject of the s.375A certificate is not relevant to the review because it is a request for information which contains the names of the officers in another department whose role relates to intelligence analysis.

18. The applicant was further told that a non-disclosure certificate has been issued pursuant to s.376 of the *Migration Act 1958 (the Act)* in relation to certain material which is on the Department case file.

19. The Department has sought to restrict the disclosure of folios 34–36, 56–66, 67–77 and 83–93. The reason stated for non-disclosure is that the information contained in the files was given to the Department in confidence and s.375A does not apply.

20. The Tribunal considers that the s.376 certificate is valid.

21. The Tribunal is satisfied that the information that is the subject of the s.376 certificate is relevant to the review because it indicates to the Tribunal that the applicant and the sponsor were not in a genuine spousal relationship.

22. The Tribunal, under the relevant provision, put the core of the information the subject of the certificate, to the applicant. The information is as follows:

- The sponsor's Centrelink outcome listing her personal information.
- Allegations the applicant entered into the marriage relationship with the sponsor in order to obtain permanent residency, and
- the applicant paid the sponsor to marry him.

23. The Tribunal notes that the delegate in their decision of 9 February 2017 makes reference to this information and that the Department invited the applicant to comment in regard to the allegation and information from Centrelink. The applicant provided a response to the Department by way of a Statutory Declaration on 20 October 2016. A copy of the delegate's decision was provided to the Tribunal by the applicant on 23 February 2017.

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25. The applicant was invited to comment on the validity of the certificate. The applicant told the Tribunal that he was aware of the Centrelink issue regarding the sponsor but only when it was brought to his attention by the Department. He denied paying the sponsor to secure permanent residency.
26. The applicant told the Tribunal that following the Department seeking his comments regarding the sponsor receiving Centrelink payments that the relationship deteriorated. The applicant and the sponsor visited his lawyer to discuss the Department's decision. The applicant claims he did not know that the sponsor had not advised Centrelink that she was in a spousal relationship and that she had told him that the Centrelink payments were for the care of her children. The sponsor became verbally abusive and blamed him for any debt she might owe Centrelink.
27. The applicant told the Tribunal that following this incident, a couple of weeks later the sponsor visited his home where they argued about the Centrelink debt. The applicant also told the Tribunal that he had met with the sponsor and one of her [daughters]. The sponsor would not talk to him but through her daughter she asked him for \$13,000 to continue the relationship. The applicant told the Tribunal that he never paid her to marry him and that she never asked for money to be in the relationship. As the sponsor suspected she would have to repay money to Centrelink she was now asking him for money and threatened to get him deported if he refused.
28. Following the sponsor's request for money, the applicant claims he ended the relationship. The Tribunal asked him when he last had contact with the sponsor to which he responded it was around mid-2016.

29. **CONSIDERATION OF CLAIMS AND EVIDENCE**

Whether the parties are in a spouse or de facto relationship

30. Clauses 801.221(2) (c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen, who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
31. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
32. **Are the parties validly married?**
33. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided with his primary application a copy of the marriage certificate dated [in] April 2013 [registered] under the *Births, Deaths and Marriages Registration Act 1995*. There is no evidence before the Tribunal to indicate that

the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

34. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b) - (d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
35. After careful consideration of all of the evidence before it, the Tribunal considers that the parties were never in a spousal relationship; therefore, it is not satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3) and the reasons for its decision.
36. The Tribunal acknowledges the delegate's concerns set out in the primary decision record and discussed these with the applicant in the course of the hearing.

Are the other requirements for a spousal relationship met?

37. *Financial Aspects*

38. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
39. The applicant and the sponsor do not have any joint ownership or joint liabilities and do not have a legal financial obligation owed to the other party. The sponsor in a Statutory Declaration of 25 February 2015 stated that they had a joint bank account with [a bank]. In support of the application, he submitted bank statements for the period 28 February 2014 to 27 February 2015. The delegate noted that the deposits for this account were made either via ATM or branch deposits indicating the existence of another account, which suggested to the delegate that the parties chose not to declare the true nature of their financial relationship.
40. The applicant told the Tribunal that they no longer have a joint account and that the sponsor had contributed nothing financially to the relationship and that it was his money in the joint account. The sponsor had a debit card linked the joint account and she used it when they went out together and occasionally would pay for lunch. The applicant advised that he solely supported her financially and that sometimes he would give her money on special occasions at other times she would ask him for money. The applicant told the Tribunal that they did not share day to day household expenses and that he paid approximately 99% of the expenses because in the Middle Eastern culture a wife is not asked about money.
41. The applicant has his own personal account and a Mastercard. The applicant's salary was directly deposited into his personal account and he paid the rent and utility bills. He used his credit card on occasions to pay the telephone and internet bills. The applicant believes that his personal debt increased during the relationship.
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43. The Tribunal accepts that the applicant was solely responsible for the financial aspects of the relationship in that he was the source of the funds in the joint bank account and responsible for the payment of the utility bills associated with the [Suburb 2] residence. The applicant provided evidence that the sponsor rarely asked him for money and on occasion, she would pay for meals using funds from the joint account..

44. The parties presented limited evidence of the financial aspects of the relationship to support that they were ever in a genuine and continuing relationship. The Tribunal places no weight on this aspect of the relationship and finds that the financial aspects of the relationship do not support there ever having been, a spousal relationship between the parties.

45. ***Nature of the Household***

46. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of the children, living arrangements and daily routine of the parties and the sharing of the responsibility for housework.

47. The Tribunal put to the applicant that a Statutory Declaration to the Department and Statutory Declarations to the Tribunal from the applicant's Clinical Psychologist and Social Worker, stated that his wife lived at her [Suburb 1] address with her children because the unit at [Suburb 2] was too small. The Tribunal asked the applicant why they didn't take this into consideration when they decided to sign a rental agreement for the unit in 2013. The applicant told the Tribunal that the sponsor was protective of her children and didn't want him moving in with her children. The applicant stated that he had nothing to do with the sponsor's children and played no role in their lives.

48. The Tribunal notes that the applicant provided a copy of the delegate's decision to the Tribunal. The delegate in their decision of 9 February 2017 made reference to a letter from the AEC to the sponsor in which the the AEC advised that they had no record of her being enrolled at the [Suburb 2] address. The Tribunal asked the applicant why the sponsor did not notify the AEC of change of enrolment after two years from when she signed the [Suburb 2] lease, the applicant told the Tribunal that he didn't know and thought that she was hiding that she lived there.

49. Information contained in the delegate's decision shows that the sponsor did not declare her marital status to Centrelink nor did she advise Centrelink of her [Suburb 2] address. The applicant told the Tribunal that the sponsor did not want him moving in with her family at [Suburb 1] as she did not want him being there because of her children. After they were married he moved to [Suburb 2]. The sponsor kept her [premises] in [Suburb 1] where her children lived. The sponsor would visit the applicant on weekends and occasionally during the week. The applicant also advised that he had worked in [City 1] for an eight month period during the marriage and occasionally had seen the sponsor during the weekends when he came back to [City 2].

50. When asked by the Tribunal what the sponsor had brought to the marital home, the applicant advised that the sponsor had not purchased or brought any furniture and had brought some clothes.

51. In regard to sharing the housework the applicant told the Tribunal that the sponsor did the cleaning and he prepared the food. He then told the Tribunal that on weekends they preferred to go out. When asked to describe a typical day in the household, the applicant told the Tribunal that most of the time they went out to restaurants and that he paid.

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53. Overall, the Tribunal considers the evidence given by the applicant is insufficient to support that the parties cohabitated or shared the responsibilities of the household. The living arrangements, as told by the applicant to the Tribunal, are not indicative of the applicant and sponsor being in a marital relationship. This is supported by the applicant's evidence at hearing and information before the Tribunal that during the relationship, the sponsor maintained her [Suburb 1] address as her primary residence and failed to notify Government Departments (Centrelink and AEC) of her marital status and the [Suburb 2] address.
54. On evidence the Tribunal finds that the applicant and the sponsor have not lived together and have not established a joint household as husband and wife and that the applicant and sponsor have lived separately and apart on a permanent basis.
55. The Tribunal therefore is not satisfied the evidence presented by the applicant in relation to the nature of the household supports the existence of a genuine and continuing relationship.
56. The parties presented limited evidence in relation to the nature of the household to support that they were ever in a genuine and continuing relationship. The Tribunal places no weight on this aspect of the relationship and finds that the nature of the household does not support there ever having been a spousal relationship between the parties.

57.

Social Aspects

58. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake social activities.
59. The applicant told the Tribunal that he and the sponsor would go for walks and play the pokies together. He does not have many friends in Australia and could not recall the name of the sponsor's closest friend. Contrary to the Statutory Declaration provided by the sponsor stating that they take beach holidays, the applicant told the Tribunal that they didn't take a holiday together. He could not recall the last event that they both celebrated together except they went to a bar at [location]. Evidence before the Tribunal shows the sponsor did not declare her marital status to Centrelink.
60. The Tribunal notes reference in the delegate's decision to the provision of two Form 888 declarations from the sponsor's daughter and the applicant's cousin. There is no additional evidence before the Tribunal about the opinion of the persons' friends and acquaintances about the nature of the relationship. The Tribunal has considered the Form 888 declarations referred to by the delegate and finds these declarations do not provide any convincing reasons as to why the declarants believe the relationship is genuine or give any insight into the development of the relationship.
61. Overall there is little convincing evidence before the Tribunal that the parties represented themselves as being in a marital relationship to the wider community or that they undertook or planned regular joint social activities. There is no evidence that they have taken holidays or travelled together or attended any significant events together.
62. On the evidence given by the applicant, the Tribunal finds that the parties did not represent themselves as being in a committed spousal relationship or were regarded by others as being in a genuine and continuing relationship.

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65. **Commitment**

66. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
67. The applicant's evidence is that he first met the sponsor in the food court at [Suburb 1] Shopping Centre in 2012. They married in March 2013 and took out a lease on a property in [Suburb 2] in May 2013. Evidence before the Tribunal indicates the sponsor occasionally stayed overnight with the applicant and the relationship ended in 2016 following the Department raising concerns in regard to the sponsor's failure to notify Centrelink of the marriage.
68. During the three years the parties claimed to have lived together there is little evidence about the degree of companionship and emotional support that the parties drew from each other. The applicant told the Tribunal that they did not really have an open and honest relationship and that he was shocked when he found out about her Centrelink payments. When faced with potential difficulty over the Centrelink issue, rather than provide support to each other, the parties argued and the relationship ceased.
69. The applicant claims when he met the sponsor, he was lonely and he wanted someone to love him. He claims she showed him how much she cared for him by the way she looked at him, held his hand and asked him how he was. He claims during the relationship she made fun of him being a Muslim and called him a wog. He remained in the relationship despite the way he claims she spoke to him and told the Tribunal that he has not commenced divorce proceedings.
70. The Tribunal is not satisfied on the evidence presented that the parties demonstrated a commitment to each other during the length of their relationship and that the degree of companionship and emotional support that the parties drew from each other is not indicative of being in a genuine and continuing spousal relationship. There is no evidence before the Tribunal to support whether the parties viewed the relationship as a long-term one.

71. **Findings**

72. After considering the evidence individually and as a whole, the Tribunal is not satisfied that a spousal or de facto relationship ever existed between the applicant and the sponsor. Accordingly, the applicant cannot satisfy cl. 801.221 (2) of Schedule 2 to the Regulations.
73. The Tribunal considered the information about the claims of family violence, in so far as it relates to the parties' relationship. As the Tribunal is not satisfied that the parties ever shared a spousal relationship, it has not gone on to consider the applicant's claims of family violence. As a result, the applicant does not satisfy cl.801.221(6) of Schedule 2 to the Regulations.
74. The Tribunal is not satisfied that at the time of the visa application and at the time of this decision, the applicant and sponsor had a mutual commitment to a shared life as a married couple to the exclusion of all others, or that their relationship was genuine and continuing. The applicant therefore does not meet the requirements of s.5F(2) of the Act.
75. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221(2)(c).

76. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), or (5).
77. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

78. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Karen McNamara
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).